IN THE HIGH COURT OF BOMBAY AT GOA

APPEAL FROM ORDER NO.24 OF 2003

Shri Vincent Palha alias
Vincente Palke (since deceased)
represented by his legal heirs

a) Smt. Damian Palha wife of
deceased Vincente Palha;

b) Master Melwyn Palha, son of
deceased Vincente Palha,

c) Master Hubert Palha, son of
deceased Vincent Palha,

d) Ms. Helen Palha, Daughter of
deceased Vincente Palha,

e) Ms Maria Goretti Palha,
Daughter of deceased Vincente Palha,

All resident of Agasaim,
Presently residing at Sonarbhat,
Saligao, Bardez, Goa. ..... Applicants.

V/s.

Mr. Jeffery Fernandes,
S/o Late Manuel Francisco
Fernandes alias Manuel Francisco
Antonio Fernandes, retired,
Sonarbhat, Saligao, Bardez, Goa. .... Respondents.

Ms. Susan Linhares, Advocate under the Legal Aid Scheme.

Mr. N.N. Sardessai, Advocate for the respondent.

CORAM : A.M. KHANWILKAR, J.

DATE : NOVEMBER 28, 2003.

ORAL JUDGMENT:

By this appeal under Order 43 of the Code of

Civil Procedure, the appellants have challenged the Judgment and Order dated February 17, 2003 passed on Civil Misc. Application No. 149/2003 which, in turn, rejected the prayer for setting aside the ex-parte Judgment and Decree passed by the Addl. District Judge, at Mapusa in Regular Civil Appeal No.46/2001 dated May 27, 2002.

2. Briefly stated, the respondent filed a suit being Special Civil Suit no.46/94 before the Court of Civil Judge, Sr. Division, at Mapusa for eviction, mandatory and permanent injunction and recovery of mesne profits, against the appellants. The said suit, however, came to be dismissed by the Judgment and Decree dated June 13, 2000. Against that decision, the respondent carried the matter in appeal being Regular Civil Appeal No.46/2001 before the Addl. District Judge, Mapusa. It is the appellants' case that the appellants were not served with summons of hearing of the said appeal at all. Nevertheless, the appeal came to be decided ex-parte against the appellants by Judgment and Decree dated May 27, 2002. By this decision, the appellate Court was pleased to decree the suit in favour of the respondent. It is the case of the appellants that as soon as the appellants became aware about the said ex-parte Judgment and Decree passed by the Addl. District Judge, Mapusa, they

immediately filed an application for setting aside the same, sometime in August, 2002, being Civil Misc. Application No.149/2002 under Order 41, Rule 21 of C.P.C. That Civil Application was, however, dismissed on February 17, 2003 being devoid of merits. Against the said decision, the appellants have preferred the present appeal from order.

3. On the other hand, the case of the respondent is that the summons regarding hearing of the appeal before the Addl. District Judge, Mapusa was sent on the known address of the appellants and the same was served on appellant No.(e) Ms Maria Goretti Palha and that position is fortified from the materials which were already on record before the Court below. In response, the appellants submit that assuming the summons came to be served on appellant No.(e), the service of that summons on the appellants was incompetent because at the relevant time, the said appellant No.(e) was, admittedly, a minor i.e. below age of 18 years. The appellants contend that as per the provisions of Order 5, Rule 15 of the C.P.C. it is obligatory that service of such summons is served on any "adult" member of the family; and since that requirement is not fulfilled, the service of summons on appellant No.(e) will be of no avail and is not a proper service on the appellants at all. It was also

their case that they had no knowledge about the service effected on appellant No.(e) as such.

4. The core question that needs to be addressed in the present appeal is, whether service of summons regarding hearing of the appeal on appellant No.(e) can be said to be legitimate, so as to reject the claim of the appellants for setting aside the ex-parte Judgment and Decree passed against them by the appellate Court ? Before we proceed to examine the submissions, it will be apposite to advert to Rule 15 of Order 5, which reads thus :

> **"Where service may be on an** adult member of **defendant's family.** - Where in any suit the defendant is absent from his residence at the time when the service of summons is sought to be effected on him at his residence and there is no likelihood of his being found at the residence within a reasonable time and he has no agent empowered to accept service of the summons on his behalf, service may be made on any adult member of the family, whether male or female, who is residing with him." (emphasis supplied)

According to the respondent, the expression used in Rule 15 is "adult member" of the family. It is, therefore, submitted that 'adult' need not be necessarily a major i.e. 18 years and above, but it is sufficient to establish that the person such as appellant No.(e) who had received the summons was

matured enough to receive the summons and, such a service would, therefore, be substantial compliance of requirement of Rule 15 referred to above. In support of the meaning of expression "adult", learned Counsel for the respondent has placed reliance on the dictionary meaning given in Concise Oxford Dictionary, Eighth Edition, which reads thus :

> "adult - adj. & n. -adj. 1 mature, grown-up. 2 a of or for adults (adult education). b euphem, sexually explicit; indecent (adult films). - n. 1 an adult person. 2 Law a person who has reached the age of majority, an adulthood n. adultly adv. [L adultus past part of adolescere grow up; cf. ADOLESCENT]." (emphasis supplied by me)

Reliance was also placed on the K.J. Aiyar's Judicial Dictionary where expression "ADULT" has been defined. The same reads thus :

> "ADULT. - One who is grown up, matured. A person who has attained the full age of majority; A person who in the opinion of the Court, before whom he is brought, is of the age of majority. [Section 2, Act 25 of 1934]. - Son does not include Chela (disciple) of a Guru (Spiritual head) within the meaning of Section 5(3) of the U.P. Imposition of Ceiling on Land Holdings Act, 1961. (State of U.P. v. Baba Ram Bharti, 1980 All LJ 37 (DB).]. (emphasis supplied by me)

Learned Counsel for the respondent submits that the above contention canvassed on behalf of the

respondent is more plausible as it can be seen from other provisions of the Code that the Legislature has employed expression "major" such as in Order 32 of the same Code. It is, therefore, contended that if the above submission were to be accepted, that would further the legislative intent; whereas by any other construction of expression "adult" stated in Rule 15 of Order 5, would do violence to the legislative intent. In my opinion, however, the submission is unacceptable. Indeed, the expression used in Rule 15 is - "any adult member of the family". However, the ordinary meaning of "adult" that a person is matured or grown up, cannot be employed while construing this provision. The argument of the learned Counsel for the respondent plainly overlooks the legal meaning of expression "adult". It posits that the person has reached the age of majority. It will be useful to advert to Section 3 of the Indian Majority Act, 1875. The same reads thus :

> "3. Age of majority of persons domiciled in India. - Subject as aforesaid, [every minor of whose person or property, or both, a guardian, other than a guardian for a suit within the meaning of Chapter XXXI of the Code of Civil Procedure, has been or shall be appointed or declared by any Court of Justice before the minor has attained the age of eighteen years, and every minor of whose property the superintendence has been or shall be assumed by any Court of Wards before the minor has attained that age] shall, notwithstanding anything contained in

> the Indian Succession Act or in any other enactment, be deemed to have attained his majority when he shall have completed his age of twenty-one years and not before.
>
> Subject as aforesaid, every other person domiciled in (India) shall be deemed to have attained his majority when he shall have completed his age of eighteen years and not before. ."

5. It is plainly clear that though expression "adult" has been employed in Rule 15 of Order 5, the same will have to be construed as "major" member of the family. To my mind, the legal meaning of expression "adult" and "major" is interchangeable. It will be useful to make reference to the Constitution Bench decision in the case of Seth Nand Lal and another v/s. State of Haryana and ors., reported in 1980 (Supp). SCC 574. The Apex Court was dealing with the provisions of Haryana Ceiling on Land Holdings Act, 1972 (Haryana Act 26 of 1972). In Section 3(l) of the said Act, expression "family" is defined to include "minor" children. In Explanation I thereto, expression "minor daughter" has been used and Section 3(q) which defines "separate unit", employs expression "adult son". The Apex Court while considering the said provisions, has in fact, used the expression "minor" in contradistinction to expression "adult". In other words, the expression "major" or "adult" are interchangeable words and the ordinary meaning of "adult" as grown up or matured will be of no avail so

as to hold that the service of summons regarding hearing of appeal on person below age of 18 years be treated as good or proper service. It is irrelevant as to whether the person was matured or grown up to understand the significance of service of Court notice. That course is not open in view of the express legal provision, for the law does not recognize service on any person, but explicitly provides that the service of summons should be on any "adult" member of the family, which means "major" member of the family. On the above reasoning, it will not be necessary for me to dwell upon other aspects of the matter, though the Counsel appearing for the parties were persuading me to decide the case on merits itself.

6. Reliance was placed on behalf of the appellants on the decision of the Apex Court in Sushil Kumar Sabharwal vs. Gurpreet Singh and ors., reported in (2002) 5 SCC 377 as to the principle that should be borne in mind while considering an application for setting aside ex-parte decree on the ground of non-service of summons on the concerned party. Reliance was also placed on the decision of the Apex Court in G.P. Srivastava vs. R.K. Raizada and ors., reported in (2000) 3 SCC 54 to support the same contention. However, as I have already taken a

view that there is no proper service of summons regarding hearing of the appeal, the ex-parte Judgment and decree passed by the appellate Court cannot be sustained. In the circumstances, it is unnecessary for me to go into the other aspects raised on behalf of the appellants.

7. As I have held that service on appellant No.(e) cannot be said to be proper and legitimate, as she was minor at the relevant time, in law, the summons regarding the hearing of the appeal have not been served on the appellants and in absence of proof of proper service on the appellants, the appellate Court could not have proceeded with the hearing of the appeal. It is not possible to accept the argument of the respondent that the appellants had knowledge about the proceedings and, therefore, no fault can be found with the approach of the appellate Court in proceeding with the appeal on merits. It is well settled that when the law requires service of summons or notice in a particular manner, that should be done in that manner alone. In other words, the knowledge of the proceedings or of pendency of the proceedings is of no consequence at all. It is only when the summons regarding the date of hearing of proceedings is served on the concerned party in the manner provided by the Code, the court would proceed

with the matter and not otherwise.

8. In the circumstances, the impugned Judgment and Order dated February 17, 2003 on Civil Misc. Application No.149/2003 as well as the ex-parte Judgment and Decree dated May 27, 2002 passed by the Addl. District Court, Mapusa cannot be allowed to stand and the same will have to be set aside on this count alone. And further the Regular Civil Appeal No.46/2001 is restored to the file of the concerned Addl. District Judge, for deciding it on merits, in accordance with law. The parties to appear before that Court on December 12, 2003. Any observations in this Judgment may not be understood as expression of opinion on merit of the rival contentions. All questions on merit are left open to be decided by the appellate Court, in accordance with law. In the circumstances, the appeal succeeds. The same is allowed on the above terms. No order as to costs.

A.M. KHANWILKAR, J.

ssm.